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No. 06-1471

IN THE

Supreme Court of the United States

DENNIS W. GAY, *et al.*,
Petitioners,

v.

SARAH MORGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 Statement set forth in the petition remains accurate.

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REPLY BRIEF FOR PETITIONERS

Lacking any supportable basis for opposing certiorari, respondent's brief in opposition rests primarily on two incorrect propositions: (1) that this Court lacks jurisdiction because the Third Circuit's mandate has issued, and (2) that the courts of appeal are not in conflict on the questions presented in this case. Respondent's jurisdictional argument is directly contrary to this Court's holding in *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-67 (1947). Respondent's denial of a split in authority among the circuits is belied by the numerous opinions that impose distinctly different burdens on a defendant removing a case to federal court. *See* Pet. 12-19.

As the petition explains, the "legal certainty" burden announced by the Third Circuit rests on a mistaken view of this

Court's precedent and diverges from other courts of appeals' determination of the same issue. The existing split in authority is firmly developed so as to permit a complete, thorough examination in this case of an important and recurring question of federal jurisdiction. This Court should grant review.

1. There is no merit to respondent's suggestion that this Court lacks jurisdiction over the petition because the Third Circuit has issued its mandate. Opp. 20. Of the lower court cases respondent cites none addresses the jurisdiction of this Court. *Id.* And not one of the cases respondent cites support the proposition that this Court's jurisdiction is extinguished upon the issuance of a circuit court mandate. Contrary to respondent's contention, this Court's decisions have long held that certiorari jurisdiction exists in precisely the circumstances presented here. In *Aetna*, 330 U.S. at 466-67, the Court explained:

> It is suggested that a decision of a Circuit Court of Appeals ordering remand of a case to a state court is not reviewable. And it is also said that we lack power to review the action of the Circuit Court of Appeals, since the mandate of that court has issued and the District Court has remanded the cause to the state court.
>
> An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here.[1] But no such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to a state court. Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction.

(Citation omitted); *see also* 17 Charles A. Wright et al., Federal Practice and Procedure § 4036 (2007) ("[I]t is clear that

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[1] As the petition explains (Pet. 7), CAFA permits a party to appeal from a remand to state court. 28 U.S.C. § 1253(c)(1).

issuance of the court of appeals mandate does not defeat the right to petition for certiorari on the ground that the case is no longer in the court of appeals"); Robert L. Stern *et al.*, Supreme Court Practice § 17.10 (8th ed. 2002) ("The issuance of the lower court's mandate, however, does not destroy the power of the Supreme Court to review the lower court's judgment").

In contrast to longstanding precedent, respondent's proposed reading of 28 U.S.C. § 1254 would deprive this Court of jurisdiction in any case in which a circuit court mandate has issued. *Compare* Fed. R. App. P. 41(b) *and* Sup. Ct. R. 13(1). Under respondent's incorrect view, certiorari jurisdiction would be forever extinguished by the simple circuit court *ipse dixit* of issuing the mandate "forthwith."

Respondent's only comment on this Court's clear holding in *Aetna* is that the decision is "very old." Opp. 22. But the more salient and dispositive points are that *Aetna* is controlling and correct.[2] Nor is there any merit to respondent's suggestion (Opp. 21) that petitioners were required to obtain a stay of the mandate to preserve this Court's jurisdiction. *See, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

2. Respondent is also incorrect in contending that there is no split of authority among the courts of appeals on the

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[2] This Court has recently granted certiorari in identical procedural circumstances as those presented here. In *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005), for example, the Fourth Circuit mandate issued on August 12, 2004, pursuant to which the district court remanded the case to state court on August 20, 2004. The timely petition for certiorari was filed on November 24, 2004, and this Court granted certiorari on February 28, 2005. *See* http://pacer.ca4.uscourts.gov/cgi-bin/reports. pl?CASENUM=03-2064&puid=0117915583 (Fourth Circuit docket); http://web2.westlaw.com/print/printstream.aspx?sv=split&destination=atp&prid=B005580 (E.D. Va. docket); S. Ct. docket 04-712; *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

questions presented in the petition. Opp. 12. The numerous cases cited in the petition (Pet. 12-19), and in the amicus briefs underscore the undeniable reality that the courts of appeals apply different standards and reach different results.

Only by denying an essential premise of the Third Circuit's decision in this case can respondent even suggest the absence of a conflict. Consistent with established New Jersey law that *ad damnum* clauses in complaints are not binding (*see* Pet. 19-22), the Third Circuit recognized that: "[i]t appears universally agreed that the effect of the [New Jersey] Rule is to significantly curtail, if not totally neutralize, the binding effect of the specific demand for damages." Pet. App. 13a. Accordingly, respondent's attempt to place this case under the rubric of binding *ad damnum* limitations contradicts the stated premise of the decision below and eliminates the entire foundation for her contention that there is no circuit split (Opp. 14-16).

Other courts of appeals apply the "preponderance of the evidence" standard to situations such as this, where a non-binding *ad damnum* clause requests damages in an amount below the jurisdictional threshold. These cases are in direct conflict with the "legal certainty" standard placed on defendants by the Third Circuit. In *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 509 (7th Cir. 2006), *cert. denied*, No. 06-1443, 2007 WL 1306340 (U.S. June 11, 2007), for example, the plaintiff, as here, pleaded a non-binding *ad damnum* below the jurisdictional threshold. The Seventh Circuit, recognizing that the *ad damnum* was nonbinding under Illinois law, gave it "no legal effect" (*id.* at 511), and placed the burden on the removing defendant to show the amount in controversy by a preponderance of the evidence.

Likewise, in *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 722 (5th Cir. 2002), the plaintiff's state court complaint purported to limit damages to an amount below the jurisdictional threshold. The Fifth Circuit, recognizing that

Louisiana gave no preclusive effect to such limitations, *id.* at 723, placed a "preponderance of the evidence" burden on the removing defendant to establish that the requisite amount was in controversy. *Id.* The court found that this burden was met, and that the plaintiff failed to demonstrate to a legal certainty that the amount in controversy was less than the jurisdictional amount. Plaintiff's motion to remand was therefore denied. *Id.* at 724-25.

In any event, there is no rational distinction between the standard to be applied where a complaint pleads no specific amount of damages versus a complaint alleging a non-binding *ad damnum*. *See, e.g., In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003) ("Where, as here, the complaint alleges no specific amount of damages *or* an amount under the jurisdictional minimum, the removing party, . . . must prove by a preponderance of the evidence that the amount in controversy exceeds [the jurisdictional threshold]. The complaint will be dismissed if it appears to a legal certainty that the value of the claim is actually less than the required amount.") (emphasis added) (internal citations and quotations omitted).

Respondent's baseless contention that no circuit split exists is also contradicted by the discussion of the issue by various courts and commentators. *See, e.g., Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996) (rejecting "legal certainty" standard, and noting that "some federal courts have in fact applied a variation of the 'legal certainty' test in removed cases where the plaintiff's complaint does not specify a particular amount of damages"); *Nagel v. Wal-Mart Stores, Inc.*, 319 F. Supp. 2d 981, 983 (D.N.D. 2004) (same); *Webb v. Am. Int'l Group, Inc.*, 277 F. Supp. 2d 1014, 1017 (E.D. Ark. 2003) ("the burden of proof required by Defendants when the complaint does not specify an actual amount of damages is unclear, because Circuit Courts are split"); *Buchanan v. Lott*, 255 F. Supp. 2d 326, 331 (D.N.J. 2003)

("courts both within and outside this circuit have split over the appropriate standard which should be employed to measure the amount in controversy"); *Biggerstaff v. Voice Power Telecomms., Inc.*, 221 F. Supp. 2d 652, 658 n.4 (D.S.C. 2002) ("there is a split of authority on the appropriate burden of proof on a motion to remand"); *Chaparro v. St. Farm Ins. Co.*, No. Civ. A 99-CV-2063, 1999 WL 961035, at *2 (E.D. Pa. Oct. 12, 1999) ("Faced with this issue, other courts have adopted a variety of standards for determining whether federal jurisdiction exists"); Milton I. Shadur, *Traps for the Unwary in Removal and Remand*, 33 The Journal of the Section of Litigation 43, 48 (Spring 2007) ("[D]efendants' burden of actually proving the amount in controversy—parenthetically leaving aside CAFA, on which the decisions to this point are split in allocating the burden of proof—is subject to differing standards from circuit to circuit. Those standards range from a preponderance-of-the-evidence test at one end of the spectrum to legal certainty at the other") (citations omitted); Robert E. Bartkus, *Defendant's Removal Burden: CAFA Defendants Must Prove Minimum Amount in Controversy for Removal*, N.J. L.J. (Feb. 19, 2007); *see also* Chamber of Commerce of the United States of America Brief Amicus Curiae at 5-10; Defense Research Institute Brief Amicus Curiae at 4-10.

In short, there is a widely-recognized, firmly entrenched split in authority as to the standard of proof required to show that the amount in controversy exceeds the jurisdictional amount. This Court's review is needed to assure uniformity of decisions, as well as to provide the federal forum that Congress directed in CAFA.

3. There is no merit to respondent's argument that the Third Circuit decision is consistent with *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Respondent's contention misconstrues this Court's statement that "unless the law gives a different rule, the sum claimed by the

plaintiff controls if the claim is apparently made in good faith." *Id.* at 288. Contrary to respondent's suggestion, this statement is grounded in a context where *ad damnum* clauses are binding, and recovery is barred above the amount demanded in the complaint. *See, e.g., De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995) ("the above statement from *St. Paul Mercury* plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint"); *Oshana*, 472 F.3d at 511 ("Such disclaimers [of damages above the jurisdictional threshold] have long been approved as a way of staying out of federal court, *see St. Paul Mercury*, but only when the disclaimer is binding") (citation omitted). Unlike respondent, other courts of appeals have been more discerning in their reading and application of *St. Paul*. *See* Pet. 14-16.

Respondent fails to address the actual holding in *St. Paul* that was applied incorrectly by the Third Circuit in the opinion below. *St. Paul* held that:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. *It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.*

303 U.S. at 288-89 (emphasis added) (footnote omitted). Although *St. Paul* placed the burden of defeating federal jurisdiction by the "legal certainty" standard on the party *challenging* federal jurisdiction, the Third Circuit inverted the standard and placed it on the party seeking to *establish* federal jurisdiction. *Cf. Wetmore v. Rymer*, 169 U.S. 115, 128 (1898) ("a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the

record, create a legal certainty of that conclusion"). The Third Circuit decision, which is contrary to the teaching of *St. Paul* and *Wetmore,* incorrectly flips the burden to require legal certainty that the jurisdictional amount was met in order to establish federal jurisdiction.

Much of the remainder of respondent's brief in opposition assumes that petitioners contend that CAFA shifted the entire burden of proof to a plaintiff opposing removal (Opp. 9-10). But petitioners make no such argument. The split in legal authority that petitioners seek to have this Court resolve is the *standard* that the removing defendant must satisfy to establish the amount in controversy for federal jurisdiction.

4. At the end of the day, this case is an ideal candidate for this Court's resolution of a recurring issue on which the circuit courts are split. Indeed, the circumstances of this case are particularly compelling. The Third Circuit permitted respondent's *ad damnum* clause in her state court complaint to weigh against federal jurisdiction, Pet. App. 8a-14a, even though New Jersey law treats such purported limitations as completely non-binding and legally ineffectual. N.J. Ct. R. 4:42-6.

Moreover, the decision below permitted respondent to narrow the scope of the requested relief through a statement in her reply brief in support of her motion to remand to state court. As the petition describes (Pet. 9, 23), the removal proceedings focused on respondent's claim for damages based on nationwide profits. Only after the record established the requisite jurisdictional amount, respondent's reply brief on remand limited the claim to damages on New Jersey sales. *Id.* Such post-removal statements foreclosed any opportunity for petitioners to meet respondent's shifting arguments by submitting evidence of New Jersey-only sales. In expressly noting and relying on this post-removal argument, the Third Circuit reached a profoundly incorrect, unfair result. *See* Pet. App. 11a ("The plaintiff's initial complaint is at least ambigu-

ous as to whether disgorgement applies to nationwide profits or New Jersey profits. As the defendants note, the plaintiff did not explicitly limit the disgorgement of profits demand to New Jersey sales rather than nationwide sales until her remand reply brief"). This was squarely against the holding in *St. Paul* that jurisdiction must be assessed as of the time of removal. 303 U.S. at 292.

Had the court held respondent to the nationwide damage claims pending on the date of removal, the record easily met the jurisdictional minimum. Indeed, the Third Circuit acknowledged that if it had the information available to respondent's newly articulated claim for relief, "our conclusion here might be that the plaintiff's claim in all likelihood exceeds $5 million." Pet. App. 10a. But the Third Circuit remanded to state court by employing a process that precluded the presentation of a record on the belatedly defined New Jersey-only damage claim.

Even imposing its heightened burden on petitioners, the Third Circuit noted that petitioners proved that more than $4 million was in controversy. Pet. App. 12a. Had the court applied the correct standard in assessing all relevant factors, including injunctive relief, attorneys' fees and punitive damages, this case would easily meet the jurisdictional minimum under the standards applied in other circuits.

Burdened with an unfairly heightened standard and respondent's shifting damages target, petitioners have been denied the opportunity intended by Congress to litigate such class action cases in a federal forum. Because the Third Circuit's standard also imposes unwarranted impediments to meeting the amount in controversy requirement for removal in non-class action cases, the ramifications of this issue are even broader and strongly favor this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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